No. 7323

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT 9

BERNHARD DAVIDOW,
Appellant,

vs.

LACHMAN BRO'S INVESTMENT CO., a corporation; G. P. ANDERSON; TITLE INSURANCE & GUARANTY CO., a corporation; CORPORATION OF AMERICA, a corporation; BANK OF AMERICA OF CALIFORNIA, a corporation; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a corporation,
Appellees.

APPELLANT'S BRIEF IN REPLY TO APPELLEES' BRIEF

(Filed by Permission of the Court.)

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Honorable Frank H. Kerrigan, Judge.

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EQUITIES OF THE CASE.

The holder of the first deed of trust covering plaintiff's properties has filed no brief on the appeal. Such first deed of trust is still outstanding and the legal title to the San Francisco property is still in the first trustee. Its right to sell under such deed of trust has been lost by its unauthorized release of part of the security without the consent of the trustor.

As to the defendant Lachman the situation is different. At a time when the greatest interest it could have in the properties is a contingent remainder, nevertheless claiming the legal title to the properties it has collected some $36,000 in rents, amply sufficient to repay the $25,000 loaned on the second deed of trust, together with its 12% interest. There certainly is no equity that can operate in its favor. As to the $25,000 paid by it to the first beneficiary, it was and is a volunteer and as such is not entitled to be reimbursed.

If it could prevail in this litigation we would have the following most unequitable situation:

Plaintiff borrowed	$150,000.00
and	25,000.00
	$175,000.00
Defendants claim to own his city property (Tr. 13)	$300,000.00
and (Tr. 13) his country property	200,000.00
They have had his rents for 26 months (Tr. 20)	35,880.00
and money for taxes, etc. (Tr. 14)	6,000.00
	$541,880.00

After absorbing this value plus plenty of interest at 12% (Tr. 10-35) the defendants now claim that plaintiff still owes $150,000.00 on his first and that he owes (Tr. 12) $6,500.00 on his second plus interest and attorney fees.

To put it another way, they have given him a credit of about $20,000.00 for all his properties. Not merely do they refuse to let him put his properties up for sale to pay his debts, claiming that he has no further rights therein; but they have made assurance doubly sure by getting part of the security out from under the load of the two debts.

If the law is with them they can do all this, but if the law is against them, then plaintiff cannot help it if they have actually overreached themselves to their injury.

There are several legal barriers across their path.

First, there is the Bentley case (217 Cal. 644, 655) which requires every creditor holding a trust deed to exhaust his security before the human debtor owes him anything, applying the well known rule as to mortgages.

With this in mind, it is clear that no creditor holding a second deed of trust can do a thing to preclude the creditor holding the first deed of trust from selling, not merely at his whim, but as a condition precedent to the collection of his debt. And obviously a sale by the first trustee would pay both debts and leave plenty over for the plaintiff.

Second, it has always been the law in California, that in those instances where the security must be exhausted before the collection of the debt, that security must be kept intact, and if any part of it is released or disposed of, no way remains to determine the deficiency.

In such instances the debt itself is cancelled by such unwarranted acts of quasi-conversion. (Sec. 1512 C. C.)

In the case at bar the second creditor begged, or rather bribed, the first creditor to convert part of the security, which was done.

So now, the common debtor is disabled from following the equitable plan of requiring the first creditor to sell and pay off the two creditors and hand the surplus to the debtor.

If it transpires that a hardship has thus been worked upon everybody by this conversion, the two creditors are the sole ones that did it and he who consents to an act is not wronged by it (Sec. 3515 C. C.). It is useless to heap charges of greed upon Davidow because their own acts against him happen to injure themselves.

It has always been a rule of law, as well as of property, that if a sale took place by the second trustee, followed by a hundred later sales, they all were nullities when the first trustee woke up and sold when he in turn got ready. The only difference is that now the Bentley case gives the debtor a right to set his first creditor going.

Both the defendants in this case have rendered a sale of all the property an impossibility. Who then should suffer by their deliberate and illegal acts of cruelty?

At the hearing of this case Mr. Justice Wilbur asked "What if the deed of trust itself permits sale under 2924 C. C."

Our answer is that we have never denied the naked

validity of a second deed of trust; we have never denied the right to sell at any time under a second deed of trust, but we do emphatically insist that no *title* to the property itself passes by sale under a second deed of trust while a first deed of trust subsists, and that Section 2924 is unconstitutional if construed to confer legal title to property itself by sale under second deed of trust while first subsists, the only interest of the second trustee being a contingent remainder.

All the "equities" in this case, we submit, are with appellant. The complaint shows (Trans. pp. 10-14) that appellee Lachman breached two express agreements to renew the second deed of trust loan. One of these promises was upon the consideration of the payment by appellant of $6,000 upon interest, etc., on the first obligation held by the bank. In the face of this payment appellee Lachman instructed the trustee to execute and sell under the second deed of trust, deliberately breaching its agreement to renew.

Judge Wilbur, at the oral argument, asked if a tender had been made prior to bringing this action. We did not have time to explain our answer at that time, merely answering in the negative. We will now elucidate.

Under the rule of property announced in *Bank of Italy v. Bentley,* the maker of a note secured by a

deed of trust is entitled to compel the creditor to first exhaust the security. Such action is a condition precedent to the personal liability of the debtor on the note. Under the statute of the state, plaintiff had a right to make his offer to pay the note dependent upon the prior sale of the property. This statute is C. C. 1498, and reads as follows:

> "When a debtor is entitled to the performance of a condition precedent to * * * performance on his part, he may make his offer to depend upon the due performance of such condition."

See also Section 1439 C. C.
See also Section 1511 C. C., Subd. 1.

We show herein that the attempted execution of the second deed of trust by the nominal beneficiary and the trustee was void. For such reason, Lachman has never "exhausted" appellant's security. So, before *exhausting its security* Lachman, by its own deliberate wrong, made it impossible for the second trustee to ever acquire title to the property. This wrong consisted in its participation in the breach of contract in taking away property secured by the first deed of trust. We have also shown in our opening briefs that this execution was premature and passed no interest in the security under the trustee's deed, while the first deed of trust subsisted.

For these reasons, Davidow has at no time been

liable to appellees upon his personal obligations; therefore, we again submit, no tender was necessary.

The relief asked for herein may appear somewhat severe. However, the penalties asked are only those expressly imposed by statute. We are only seeking the relief for appellant which the statutes prescribe. The Circuit Court for the Sixth Circuit, in the case of *Nu-Grape Bottling Co. v. Comati,* 40 Fed. (2d) 187, 189, (2), says:

> (2) The contract provision is plain, the legal rights of the parties are clearly established by it, and equity is powerless to strike it down upon any such consideration as that perchance there may be some hardship in the execution of it. (*City of LaFollette vs. LaFollette W. etc. Co.,* 252 Fed. 762, 768 (C. C. A. 6).

SALE BY SECOND TRUSTEE VOID.

In appellant's opening brief, we show that the deed of the second trustee to Anderson passed no title for the reason among others, that the notice of sale was insufficient. (See Appellant's Brief, pp. 41-42). At this time we wish to again call the point to the attention of the Court and cite additional authority.

The second trust deed provided (Trans. 36-37)

that in case of default the holder of the note could cause the "property hereby granted to be sold in order to accomplish the objects of these trusts." * * * "It (the trustee) shall first give notice of the time and place of such sale in the manner provided by the laws of this state in force at the time of giving such notice. * * *"

"The law in force at the time of giving such notice" were C. C. 2924 and C. C. P. 692. In so far as applicable, C. C. P., section 692, at that time, read as follows:

> "Before the sale of property on execution or under power contained in any deed of trust, notice thereof must be given as follows:
>
> 3. IN CASE OF REAL PROPERTY: by posting (written) notice (of the time and place of sale) *particularly describing the property* for twenty days in three public places of the township or city where the property is to be sold and publishing a copy thereof once a week for the same period in some newspaper of general circulation printed and published in the city or township in which the property is situated, if there be one. * * *."

The facts alleged in the complaint show (Trans. p. 16, par. XI), admitted here, that two separate notices of sale were given; one in San Francisco in which the San Francisco property only was de-

scribed, and the other in Napa County in which only the Napa County property was described. "The property" here consisted of the two parcels.

The authorities are practically unanimous where property is to be taken under such a power that a strict adherence to the statute or agreement is necessary; and that when there has been a departure, especially in the notice of sale, a sale thereunder is void.

The leading case upon this point is *Sears v. Livermore,* 17 Ia. 297, 85 Am. Dec. 564.

Quoting from a New York case, the Iowa Court says:

> "It is a familiar rule of law that a special authority must be strictly pursued. When such authority is prescribed by statute, and when in its exercise it operates to divest the citizen of his property, courts cannot be too sedulous in confining it within the boundaries which the legislature have thought fit to prescribe. At this day, and in this country especially, the protection of private rights demands this safeguard and he who will review the adjudications of our courts, involving this principle, will be interested to observe with what uniformity and increasing jealousy the exercise of such a power has been restricted to its own special limits."

And a little further on, commenting upon the facts in the case, the Court says:

> "For if posting in one place is the same as posting in another, or if the doing of one thing is the same as something else (where a strict and not a substantial compliance is demanded), the plaintiff is without remedy; otherwise not. That notice of the sale was thus more generally known, and more persons called to the sale, than if given according to the terms of the deed, can make no difference. The parties agreed upon one notice, at one place, for twenty days. Suppose the trustee posted a thousand notices in as many different places in the county, for three months, and had publication made for the same time in the two newspapers of the town of Maquoketa, but failed to place an advertisement at the place required by the deed, would this be a compliance with the power? Could it be said there was no prejudice? That all this tended to and probably did promote the grantor's or debtor's interest, and therefore the sale should be upheld? If so, then the contract amounts to nothing. If so, then a party can just as well be brought into court by having the sheriff and all the constables in the county, and a hundred of his neighbors, tell him that an action is pending; can just as well be concluded by such notice as by that required by the statute. Such notice might give him vastly more information than an ordinary "summons", or the "notice of the stat-

> ute"; but the cardinal trouble is, that it is not what the law requires; and there can be nothing equivalent to this; the law allows no substitute. To the parties under such an instrument as this, the contract furnishes the law. Without the notice which they have agreed upon, there is no power to sell; there is no jurisdiction."

In the case at bar the statute provided that the notice of sale "must" describe "the property". The property covered by the deed of trust was composed of two parcels—one in the City and County of San Francisco and the other in Napa county. No notice was posted or published which described "the property" as required by the statute.

This Iowa case has been cited approvingly in the two following California cases:

> *Sav. & Loan Assn. v. Deering,* 66 Cal. 281, 285;
> *Sav. & Loan Assn. v. Burnett,* 106 Cal. 514, 534.

To the same effect, in addition to the authorities cited on page 42 of our printed Brief for Appellant, we refer to the following:

> 85 Am. Dec. 568, Note, where it is said: Directions in powers must be strictly, literally, and precisely followed. (Citing cases)

41 C. J., titl. "Mortgages", p. 955, Note 94; p. 958, Note 50; p. 963, Note 36;

Cleveland v. Bateman, (N. M.) 158 Pac. 648, and cases cited on page 654.

Also the following California cases:

More v. Calkins, 85 Cal. 177, 188;
Beck v. Ransome-Crummey Co., 42 Cal. App. 674, 680 (5).

It should here be noted that any recitals in the trustee's deed to the effect that due notice of sale had been given, are not binding on appellant:

Harker v. Rickershauser, 94 Cal. App. 755, 761;
Seccombe v. Roe, 22 Cal. App. 139; 133 Pac. 507.

JURISDICTION.

The statute is plain. The Federal Court has jurisdiction, under Paragraph 14 of Section 41 of the Judicial Code (28 U. S. C. A.) of all

"Suits to redress deprivation of civil rights" "Fourteenth" "Of all suits at law or in equity authorized to be brought by any person to redress the deprivation, *under color of any law,* statute, ordinance, regulation, custom, or usage *of any State,* of any right, privilege or im-

munity secured by the Constitution of the United States" etc.

We pin our faith to *City of Louisville vs. Cumberland etc. Co.,* 155 Fed. 725, which appellees (page 17) state is *"on all fours"* with the case at bar.

We also rely upon *Seattle Elec. Co. vs. Seattle Ry. Co.,* 185 Fed. 365, which appellees say (Page 19) is *"directly in point."*

We further rest upon *Home Tel. & Tel. Co. vs. L. A.,* 227 U. S. 278; 57 L. Ed. 510; which appellees failed to find.

These cases flatly hold that where a State law itself provides a means for taking property without due process of law, the party injured may go straight to the Federal Courts for redress. But if he merely complains of a municipal ordinance, as distinct from a state law, he still may go direct to the Federal Courts in some instances but he may not seek that forum where the municipal ordinance is not an expression of state law. In such latter event he goes first to his state courts.

Seattle Elec. Co. vs. Seattle etc. Ry. Co., 185 Fed. 365.

(369) "The Circuit Court *has* jurisdiction in a case when the *Constitution or law of a state* is claimed to be in contravention of the

Constitution of the United States, but the claim must be real and substantial."

(370) "A municipal *ordinance* passed *pursuant to the authority of the state* which abridges the privileges or immunities of a citizen, or deprives a person of property without due process of law *may be* therefore an act of the state prohibited by the Constitution."

"But the ordinance to come within the prohibition of the Amendment must, *by implication at least, express the will of the State.*"

"It must be the act of the State."

City of Louisville vs. Cumberland Tel. & Tel. Co., 155 Fed. 725.

"If the State has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service then the establishment of rates under this power would be the establishment of rates by the State itself. (citation)

"But this is just what the bill charges has not been done, thereby depriving the circuit court of every foundation for its jurisdiction as a suit arising under the Constitution and laws of the United States."

We lean upon another citation adduced by appellees on page 14, viz:

Kiernan vs. Multnomah County, 95 Fed. 849.

> "The Fourteenth Amendment has reference exclusively to State action, and not to any action by individuals. It is a prohibition upon the State to MAKE or enforce any law which shall * * * deprive any person of property without due process of law. It prohibits State *legislation* in violation of these rights" (etc.).

In the case at bar the State of California has made a law, Section 2924 C. C. which provides a pretended means by which a holder of a second deed of trust (who never had title to property itself) may transfer the *title,* (which neither he nor the debtor has) to a third party.

In other words, that section allows the holder of a second deed of trust to pass actual title before he gets actual title and in face of all the decisions holding that the actual holding of title by a trustee is essential to the validity of any sale by such trustee.

> "the title must remain in the trustee for that purpose"
>
> *Bryant vs. Hobert,* 44 Cal. App. 315 and *Finnie vs. Smith,* 257 Pac. 869.

That section, if construed to permit a sale by a second trustee while a first deed of trust subsists, is also unconstitutional in that it permits the holder

of a second deed of trust, by the device of a sale, to rob the debtor of the right recognized in the Bentley case to require his property to be sold under the first deed of trust.

The individual did not make the law. The State did it; and now the individual, under color of that law, claims title.

No one will pretend that his acts in going through the motions of a sale under trust deed have any effectivity in the absence of a statute like Section 2924 to back him up; or why attempt to follow it?

After my property is taken without due process of law, by following a statute, the State cannot hide behind a bush or point to the trustee under a second deed of trust and say "He sold it. I didn't."

The sufferer has a right to delete from the statute as unconstitutional any language which accomplishes such result; in other words, the right to a decision that as to him the statute is unconstitutional.

IN FURTHER REPLY TO APPELLEES' BRIEF.

Appellees say (page 2):

> "Appellant defaulted in the payment of money due G. P. Anderson, secured by the second deed of trust, * * *."

This is an erroneous use of the word *defaulted. Default* is thus defined in the Standard Dictionary:

> "1. A failure in the performance or fulfilment of an obligation; neglect or omission of what is due; especially the neglect or omission of a legal requirement."

Under the authority of *Bank of Italy v. Bentley,* 217 Cal. 644, we have shown that appellant was at no time delinquent under either trust deed. (Appellant's Brief 16-17; Part Two 2-3)

Appellees say (page 2):

The properties were sold to appellee Anderson. We have shown herein that that sale was void by reason of the failure to give proper notice.

Appellees say (page 3):

> "Appellant claims that, under California law, a trustor can create but *one* valid deed of trust on real property to secure the payment of money or other obligation."

This is but a half-truth. Appellant claims that a trustor can convey his *present* title but once. *Non dat qui non habet.* That when he delivers a second trust deed while the first is outstanding that the second trustee obtains no present interest in the title. (Appellant's brief, Part Two 11-13)

Appellees quote paragraphs XIII and XIV of the

complaint (pages 4-7). When read alone these paragraphs do not show the facts in detail upon which appellant relies to confer jurisdiction upon the District Court. These details are set forth in paragraphs VI to XI, inclusive. With the exception of the second paragraph of XIII, and the first sentence of paragraph XIV, these quoted paragraphs are mere reiterations and redundant allegations.

Appellees emphasize the following excerpt from the case of *McLeod v. Moran* (page 11):

> "Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title."

Strictly speaking, this language is not correct. The law treats him as retaining all the rights incident to the ownership of the granted premises; but in so far as the *title* is concerned, he has completely divested himself of every right to that, both legal and equitable.

> *Ward v. Waterman,* 85 Cal. 488, 506;
> Civil Code 863.

The seeming conflict between the California cases, a great many of which are cited and quoted from by appellees (9-13) has been definitely settled by the State Supreme Court, and is now a settled rule

of property, in the case of *Bank of Italy v. Bentley,* supra. This rule of property is that under a deed of trust the title, both legal and equitable, passes to the trustee. Upon this point there is no quarrel here.

Respectfully submitted,

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